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Interception on the High Seas
An Alternative to Elude the Principle of *Non-
Refoulement?*

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Summary

Pre-border controls can be used to control the movement of migrants outside of the state's territory in order to avoid obligations that is stated in international refugee law and human rights law. Extraterritorial migration management are often settled through bilateral agreements between the state of origin and the prospect destination country. The cooperation between Italy and Libya constitutes an example of extraterritorial migrations management. Migrants are being returned to Libya through maritime interception with support from Italy in compliance with the Memorandum of Understanding that was signed in 2017. Non-governmental organizations and international bodies publish reports of the inhuman treatment that face migrants in Libya. This cooperation has been highly criticized for breaching the principle of *non-refoulement*.

The overall aim of this study is to explore interception on the high seas that occur in compliance with bilateral agreements between Italy and Libya and the compatibility with the principle of *non-refoulement*. To achieve the overall aim of this study will the implication of the principle of *non-refoulement* and its appliance on the high seas be examined. The study will explore interception on the high seas and the legal standards that must be considered. There will also be an investigation whether the Memorandum of Understanding constitutes a potential breach the principle of *non-refoulement* by Italy. A legal dogmatic method will be used to conduct the study.

The study shows that the cooperation between Italy and Libya constitutes a potential breach of the principle of *non-refoulement*. It has been affirmed in earlier case-law from the European Court of Human Rights that the *refoulement* of migrants to Libya entails a real risk of being exposed to torture or other inhumane treatment after being returned.

Sammanfattning

Extraterritoriella gränskontroller används för att kontrollera migranter utanför statens eget territorium. Detta kan göras med syftet att undgå de skyldigheter som är fastställda i internationell flyktingrätt. Ursprungsstaten och den förväntade destinationsstaten kan ingå bilaterala överenskommelser kring extraterritoriella gränskontroller, vilket samarbetet mellan Italien och Libyen är ett exempel på. I enlighet med överenskommelsen Memorandum of Understanding från 2017 blir migranter tillbakavisade av den libyska kustbevakningen och återförda till Libyen. Aktionerna sker med stöd av den italienska regeringen. Icke-statliga organisationer och internationella organ fortsätter att publicera rapporter som visar på det inhumana bemötandet som migranter utstår vid återvändandet till Libyen. Samarbetet har därför kritiserats för att bryta mot principen om *non-refoulement*.

Det huvudsakliga syftet med denna uppsats är att undersöka om tillbakavisandet av migranter på internationellt vatten är förenligt med principen om *non-refoulement*. För att uppnå syftet kommer en undersökning ske av innebörden av *non-refoulement* samt dess tillämpning på internationellt. Det kommer slutligen ske en granskning för att utreda huruvida tillbakavisandet av migranter som sker i enlighet med Memorandum of Understanding bryter mot principen om *non-refoulement*. Undersökningen sker genom rättsdogmatisk metod.

Resultatet visar på att tillbakavisandet av migranter som sker i enlighet med Memorandum of Understanding bryter mot principen *non-refoulement*. I praxis från Europadomstolen har det tidigare fastställts att migranter löper en reell risk att utsättas för tortyr och annan inhuman behandling vid ett återvändande till Libyen.

Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
MoU	Memorandum of Understanding
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Seas
UNHCR	United Nations High Commissioner for Refugees
Refugee Convention	Convention Relating to the Status of Refugees

1 Introduction

1.1 Interception on the High Seas and Legal Issues

A vessel transporting an estimated 150 people started sinking on the 6 November 2017. The event took place on international waters outside the Libyan coast and a rescue operation instigated by the French non-governmental organization Sea-Watch. According to 17 survivors the rescue attempt was interrupted by the Libyan Coast Guard who started throwing objects at the crew and beating the rescued. 47 people were intercepted and taken to Libya by the Coast Guard and the individuals were detained, despite of several reports by non-governmental organizations and international bodies of systematic torture and inhuman treatment in these detentions. An unknown number of people, including children, died during this event.¹

This is an example of extraterritorial migration management where the prospective destination countries control the movement of people beyond its borders. Extra territorial pre-border controls are increasingly being used by states in order to keep migrants afield from the territory and jurisdiction of the state to avoid triggering their obligation that is stated in international refugee law and human rights, that is the principle of *non-refoulement*.²

The measures to intercept migrants on the high seas are part of the cooperation between Italy and Libya to fight clandestine migration,³ which is stated in the Memorandum of Understanding that was signed 2 February 2017. The cooperation has endured criticism due to the potential breach of the principle

¹ Human Rights Watch: *Italy Shares Responsibility for Libya Abuses against Migrants – Third-Party Intervention Filed at European Court of Human Rights*, <www.hrw.org/news/2019/11/13/italy-shares-responsibility-libya-abuses-against-migrants>, accessed: 2020-01-05.

² Goodwin-Gill (2017), p. 22.

³ Tullio Scovazzi (2014), p. 224.

of *non-refoulement* due to the risk of being returned to a country where the migrant will be exposed to torture or other inhuman treatment.⁴ The events that took place on the Mediterranean is the center of the case *S.S and Others v. Italy* which is pending before the European Court of Human Rights, where the applicants claim the interception to be a breach against the principle of *non-refoulement* by Italy.⁵

There is a need for an examination of the compatibility of migration management and border control policies with international law. The principle of *non-refoulement* is a fundamental keystone of international refugee law and human rights. It is therefore of significant importance to explore the extent of the principle of *non-refoulement* and whether it is applicable on migrants on the high seas. How far can a state go in order to control its borders without breaching fundamental human rights?

1.2 Purpose and Research Questions

The overall aim of this study is to explore interception on the high seas that occur in compliance with bilateral agreements between Italy and Libya and the compatibility with the principle of *non-refoulement*.

To achieve the overall aim of this study, the specific objectives are to:

- Examine the implication of the principle of *non-refoulement* and its appliance on the high seas.
- Explore interception on the high seas and the legal standards that must be considered.
- Investigate whether the Memorandum of Understanding (MoU) can potentially breach the principle of *non-refoulement* by Italy.

⁴ Human Rights Watch: *Italy Shares Responsibility for Libya Abuses against Migrants – Third-Party Intervention Filed at European Court of Human Rights*, accessed: 2020-01-05.

⁵ European Court of Human Rights: *Factsheet – Collective expulsions of aliens*, <www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf>, accessed: 2020-01-05.

1.3 Methodology and Material

A legal dogmatic method is used to conduct the research. This method entails to understand the meaning of the law through interpretation and practice of relevant legal sources on a specific problem.⁶

The research is pursued through interpretation of the legal sources European Convention for the Protection of Human Rights (ECHR)⁷ and the 1951 Convention Relating to the Status of Refugees (the Refugee Convention)⁸. The principle of *non-refoulement* can be found in several international and regional treaties but this study will exclusively focus on the definitions that can be found in the Refugee Convention and ECHR. The Refugee Convention is of importance since this is the mainstay of international refugee law and it is the first treaty that stated the principle of *non-refoulement*. ECHR is essential to this study since it states the prohibition against *refoulement* in human rights law. The case-law that will be examined regarding interception on the high seas are judgements from the ECtHR and consequently is ECHR necessary for this study.

Legal doctrine is used to understand the theoretical aspects of the principle of *non-refoulement* and interception on the high seas. Recommendations and policy considerations from the United Nations High Commissioner for Refugees (UNHCR) is used to examine whether interception on the high seas is applicable with the principle of *non-refoulement*.

Case-law from the European Court of Human Rights (ECtHR) is used to understand the mandatory obligations due to the principle of *non-refoulement* when using interception as migration management. It is also used to understand the practical aspect of the use of interception on the high seas and the application with the principle of *non-refoulement*.

⁶ Kleineman (2018), p. 21 ff.

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, Rome.

⁸ Convention Relating to the Status of Refugees, 28 July 1951, Geneva.

Reports from the non-governmental organizations Human Rights Watch (HRW) and Amnesty International is used to understand the situation in Libya and why the refoulement to Libya could constitute a potential breach against the principle of *non-refoulement*.

The case *S.S and Others v. Italy* is currently pending before the court and no judgement been delivered from the ECtHR. The joined third-party intervention from HRW and Amnesty International has been published and will therefore be used to comprehend the legal issues of the case.

Legal sources are used to construct the meaning of law, more exactly to analyze whether the MoU is a breach of the principle of *non-refoulement*. A critical perspective will permeate the analysis of this study. The legal dogmatic method entails to understand the meaning of the law, but focus will be drawn to the unsatisfactory legal position through a discussion using the legal sources.⁹

1.4 Delimitations

Focus during this essay will be on the principle of *non-refoulement* regarding interception at the high seas. This paper is limited to discuss the effects on the right to seek asylum. This is closely associated with the right to asylum, which determines who has the right to international protection as a refugee. The right to asylum will not be studied in this essay.

A priority within the European Union (EU) is the establishment of effective control of the external border in order to control the illegal flow of migrants. An example of this deepened cooperation between the EU and Libya is the Malta Declaration.¹⁰ The Malta Declaration is closely connected to the

⁹ Kleineman (2018), p. 40; Jareborg, Nils, *Rättsdogmatik som vetenskap*, SvJT, <www.svjt.se/svjt/2004/1> , accessed: 2020-01-06.

¹⁰ Council of European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, Statements and remarks 43/17, 3 February 2017,

cooperation between Italy and Libya since the Declaration has incorporated the Memorandum of Understanding.¹¹ This paper will examine the cooperation throughout bilateral agreements between Italy and Libya as single states, not the cooperation between the EU and Libya. This choice is based on the long-standing cooperation between Italy and Libya in the field of interception on the high seas and the case-law in this field.

1.5 Previous Research

The principle of *non-refoulement* is a fundamental keystone of international migrant protection and has been subject to a vivid academic debate. The legal obligations due to international refugee law and human rights is still undermined, which has become clear due to the critique that the cooperation of migrations management between Italy and Libya. This imply that the extent of the principle of *non-refoulement* is still vague and that further research is needed.

1.6 Disposition

Chapter 2 starts by examine the principle of *non-refoulement* as stated in the Refugee Convention and ECHR. There will also be a section of the application of the principle of *non-refoulement* on the high seas.

Chapter 3 inspects extraterritorial pre-border controls and the legal standards regarding maritime interception on the high seas. The issue of extraterritorial jurisdiction will be examined.

<www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/pdf>, accessed: 2019-11-04.

¹¹ Ibid; Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, December 2017, p.43, <www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>, accessed 2019-12-28.

Chapter 4 constitutes of the development of bilateral agreements between Italy and Libya concerning maritime interception of migrants. There will be an examination of the case *Hirsi Jamaa and Others v. Italy* where the Court found a violation of the principle of *non-refoulement* by Italy. There will be an inspection of current development on the cooperation between Italy and Libya since the signing of the MoU. There will also be an examination of the case *S.S and Others* that is pending before the ECtHR.

Chapter 5 constitutes an analysis in order to answer the research question. The chapter will be summarized by a final conclusion.

2 The Principle of *Non-Refoulement*

One of the keystones of international law is the sovereignty of the state. Every state has the right to decide whether a foreign national is allowed to enter the territory of that state due to territorial supremacy. State sovereignty is somewhat restricted by human rights and international refugee protection obligations, among them the principle of *non-refoulement*.¹² The principle of *non-refoulement* is essential in order to secure the right to seek and enjoy protection and asylum in other countries,¹³ which is stated in Article 14(1) of the Universal Declaration of Human Rights.¹⁴

The principle of *non-refoulement* is one of the core provisions of the Refugee Convention. It has later been stated in other international human rights treaties such as The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁵ and the International Covenant on Civil and Political Rights (ICCPR).¹⁶ The principle is also guaranteed at a regional level in the ECHR.¹⁷

2.1 The Principle of *Non-Refoulement* in the Refugee Convention

The principle of *non-refoulement* in Article 33(1) of the Refugee Convention stipulates that:

¹² De Weck (2017), s. 1.

¹³ UNCHR, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CPR.17, 9 June 2000, accessed: 2019-11-15, para. 21.

¹⁴ Universal Declaration of Human Rights, 10 December 1948, Paris.

¹⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York.

¹⁶ International Covenant on Civil and Political Rights, 16 December 1966, New York.

¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, Rome.

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁸

The principle of *non-refoulement* also prohibits indirect *refoulement*, that is the removal to a third country where the refugee or asylum-seeker is in jeopardy of being redistributed to a country where he or she fears prosecution or other inhumane treatment.¹⁹

The principle of *non-refoulement* in the Refugee Convention has its source in the definition of a refugee, which is defined in Article 1A(2).²⁰ The principle of *non-refoulement* apply on individuals defined as a refugee as well as asylum-seekers.²¹

The prohibition of *refoulement* of a refugee should not be confound with the right to admission into the country, that is the right *to* asylum.²² Thus, the state must ensure that no rejection occur without a determination of the status of the individual in order to ensure that the person won’t be refouled to a state where his or her life is threatened. It is essential that the state provides effective measures for refugee status determinations.²³

¹⁸ Convention Relating to the Status of Refugees, article 33(1).

¹⁹ UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, HCR/MMSP/2001/09, <www.refworld.org/docid/3d60f5557.html>, 16 January 2002, accessed: 2019-11-10, para: 22.

²⁰ Convention Relating to the Status of Refugees, article 1A(2) defines a refugee as a person who “[...] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political option, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or, who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

²¹ De Weck (2017), p. 44.

²² Goodwin-Gill & McAdam (2007), p. 215.

²³ UNHCR Executive Committee, *General Conclusion on International Protection General Conclusion on International Protection*, No. 99 (LV), 08 October 2004, <www.unhcr.org/excom/exconc/41750ef74/general-conclusion-international-protection.html>, accessed: 2019-12-01, para. 1

The number of persons who are entitled to enjoy the protection of the Refugee Convention are limited. According to Article 1F(a-c) shall the Refugee Convention not apply on people who committed serious crimes such as crimes against humanity. Another explicit exclusion from the principle of *non-refoulement* can be found in Article 33(2) which excludes refugees from protection “[...] if there are reasonable grounds for regarding them as a danger to the security of the country in which they are [...]”²⁴. These exceptions must be applied restrictively and the state needs to observe the principle of proportionality.²⁵

2.2 The Principle of *Non-Refoulement* under ECHR

The principle of *non-refoulement* is not explicitly guaranteed in ECHR but is inherent in the prohibition against torture. Article 3 ECHR enshrines a responsibility on the contracting states not to deport an individual that affirmed that he or she face a real risk of inhuman or degrading treatment in the case of deportation.²⁶ Article 3 ECHR states that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.²⁷

The general and well-established principle of international law is that the member states has the right to control their borders, according to the ECtHR. Thus, Article 3 does not entail non-nationals an assurance to enter the territory of a contracting state.²⁸ This imply that the principle of *non-refoulement* constitutes an exception to the general principle. The Court is attentive to the issue between the general principle and the obligation under Article 3 in *Saadi*

²⁴ Convention Relating to the Status of Refugees, article 33(2).

²⁵ Lauterpacht & Bethlehem (2003), p. 176.

²⁶ De Weck (2017), p. 17.

²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, article 3.

²⁸ *Saadi v. Italy* [GC] Appl. No. 37201/06, ECtHR 28 February 2008, para.124.

v. Italy.²⁹ The Court emphasizes that there is no exception from Article 3 permissible when an individual establishes a genuine risk of ill treatment. The Court declare that the prohibition against torture is absolute and “enshrines on of the fundamental values in a democratic society”.³⁰

2.3 The Legal Nature of *Non-Refoulement* on the High Seas

A great many of the world’s countries are bound by the principle of *non-refoulement* through at least one international or regional treaty.³¹ The parties to the Refugee Convention and the 1967 Protocol issued a Declaration where they reaffirmed their commitment to the Convention and recognized the principle of *non-refoulement* as a core principle that is embedded in customary international law.³² All States are thereby bound by the principle of *non-refoulement*, whether or not they have ratified the conventions that explicitly state the principle. Some even argue that *non-refoulement* has achieved the status of a jus cogens norm due to its close connection to the absolute prohibition against torture.³³

The interpretation of the responsibility differed between states, as well as other actors, despite that several relevant international instruments establish the importance of the principle. The situation on the high seas is such an area where the application, responsibility and obligations of states still call into question. The former legal adviser of the UNHCR and professor of asylum law Guy S. Goodwin-Gill explain that some states find that the high seas offer a possibility for rule-free actions. The high seas can seem like a place where states are allowed to carry out national interest in a common space under the conception that the act is non-territorial. States have thereby attempted to

²⁹ Ibid.

³⁰ Ibid, para: 127.

³¹ De Weck (2017), p. 2.

³² UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, accessed: 2019-11-10 para: 4.

³³ De Weck (2017), p. 3; Judge Pinto de Albuquerque in his Concurring Opinion to Hirsi Jamaa [GC] Appl. No.27765/0923, ECtHR, 23 February 2012.

avoid the principle of *non-refoulement* to be generated. States have challenged the applicability of the principle of *non-refoulement* throughout extraterritorial migration management, which is a development that has been seen during the recent years on the Mediterranean.³⁴

Goodwin-Gill continues by arguing that this constitutes an illusion that the high seas is an area for rule-free actions. He claims that due to the basic principles of state responsibility must overarching principles such as the prohibition of *refoulement* be respected as well as maritime law.³⁵

The Parliamentary Assembly of the Council of Europe also observed this ambiguity in Resolution 1821 concerning interception and rescue of migrants and asylum seekers at sea. The Assembly notes that maritime arrivals have created several problems. One of these problems is the application of *non-refoulement* and the fact that the Member States of the European Union appear to interpret the principle differently. Some states question whether the principle is applicable on the high seas and other states do not agree on the extent of their responsibilities.³⁶

³⁴ Goodwin-Gill (2017), p. 23.

³⁵ Ibid.

³⁶ Resolution 1821 of the Parliamentary Assembly of the Council of Europe. *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, <www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18006&lang=en>, 21 June 2011, accessed: 2019-11-15, para: 5.1.

3 Interception at the High Seas

The general principle stipulates that a migrant must come within the territorial jurisdiction of the state in order to claim the right to international protection.³⁷ The prospective destination countries can thereby avoid their obligation that is stated in international refugee law by controlling the movements of people beyond its borders. The prospective destination state can keep migrants afield from the territory and jurisdiction of the state.³⁸

The number of pre-border mechanism has increased over the last decades to reinforce territorial border controls.³⁹ Pre-border controls has created a system of surveillance where the individual encounter the external border before the encounter of the territory of the country of refuge.⁴⁰ These pre-border controls can be administrative measures outside the prospective destination states own territory in order to intercept undocumented migrants. This type of pre-border controls can be found in a number of transit countries who receive financial support and assistance to detect, detain and remove undocumented migrants.⁴¹ Another type of pre-border control is physical interception. Maritime interception operations of vessels within territorial waters of the third state or on the high seas is an example of physical interception where migrants are incapable to reach their destination.⁴²

³⁷ ECtHR, *Guide to Article 1 of the ECHR*, <www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf>, 31 August 2019, accessed: 2019-12-13, para: 11.

³⁸ Goodwin-Gill (2017), p. 22.

³⁹ Rubio-Marin (2014), p. 3.

⁴⁰ Moreno-Lax (2017), p. 1-2.

⁴¹ UNHCR, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, accessed: 2019-11-29, para: 13.

⁴² *Ibid*, para: 12.

3.1 Political Considerations Regarding Interception at the High Seas

The concerned states at Europe's southern border and the EU has emphasized the increasing mixed migration consisting of refugees, asylum seekers, irregular migrants and others that risk their lives through unauthorized and illegal arrivals. There is also a growing concern about the accumulative smuggling of these persons which could lead to a misuse of the established asylum procedures that is offered.⁴³ This argument is often used to advocate a closer cooperation between the member states of the EU as well as with third countries⁴⁴.

UNHCR declared that migration control measures are essential due to the legitimate interest of states to control irregular migration. UNHCR has expressed concern regarding the impact on asylum-seekers and refugees that these extraterritorial measures entail, even if the primary aim to manage irregular migration is legitimate. UNHCR emphasize the need for adequate safeguard for protection in order to identify those who are entitled to the required protection as a refugee since the absence of these measures could outcome in the refoulement of refugees, and thereby breach the principle of *non-refoulement*.⁴⁵ UNHCR also notes the limited ability to perform formal refugee status determinations when intercepting migrants on the high seas.⁴⁶

⁴³ Moreno-Lax (2017), p.2; UNHCR, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, accessed: 2019-11-29, para: 14-15.

⁴⁴ Resolution 1821 of the Parliamentary Assembly of the Council of Europe. *The interception and rescue at sea of asylum seekers, refugees and irregular migrants*, accessed: 2019-11-15, para: 5.1-5.

⁴⁵ UNHCR, *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, accessed: 2019-11-29, para: 17 ff.

⁴⁶ UNHCR, *Protection Policy Paper: Maritime interception and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, <www.refworld.org/docid/4cd12d3a2.html>, accessed: 2019-11-26.

3.2 Extraterritorial Jurisdiction on the High Seas

Due to the special maritime environment on the high seas is the question of jurisdiction another aspect that is of importance. The high seas open to all states according to Article 87 United Nations Convention on the Law of the Seas (UNCLOS).⁴⁷ The high seas are governed by the principle of the freedom of the high seas and is therefore beyond all state's sovereignty.⁴⁸ The existence of jurisdiction is essential in order to determine state responsibility under human rights and refugee law.⁴⁹ The exercise of jurisdiction generally require some kind of contact between the migrant and the state.⁵⁰ The Contracting states of ECHR, thereby Italy, are obligated to protect everyone within their jurisdiction according to Article 1 ECHR. The meaning is mainly territorial. A migrant must thereby come within the state's territory in order to be protected by the rights that are stated in Article 3.⁵¹

Extraterritorial jurisdiction must be seen as an exception to the general principle⁵² and an evaluation must be based on the circumstances in the current situation.⁵³ Extraterritorial jurisdiction can be based on the effective control that the state exercise over an individual, *ratione personae*. Jurisdiction can also be based on the effective control that the state exercise over the foreign territory, *ratione loci*.⁵⁴ Accordingly, acts executed on a vessel on the high seas can fall within the jurisdiction of a state that exercise effective control over the individuals or territory.⁵⁵

⁴⁷ United Nations Convention on the Law of the Sea, 10 December 1982, Montego Bay.

⁴⁸ Tullio Scovazzi (2014), p. 216.

⁴⁹ Ibid, para: 9.

⁵⁰ Gammeltoft-Hansen (2017), p. 70.

⁵¹ ECtHR, *Guide on Article 1*, para. 11.

⁵² Ibid.

⁵³ UNHCR, *Protection Policy Paper: Maritime interception and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, accessed: 2020-01-02, para: 9.

⁵⁴ ECtHR, *Guide on Article 1*, para: 29.

⁵⁵ Ibid, para.32.; UNHCR, *Protection Policy Paper: Maritime interception and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, accessed: 2020-01-02, para: 10.

4 Bilateral agreements between Italy and Libya

Physical interception can be used as a method to keep migrants away from the territory and jurisdiction of the prospective destination state. These kinds of extraterritorial migrations management are often settled through bilateral agreements between the state of origin or transit with the prospect destination country.⁵⁶ The collaboration between Italy and Libya is an example of this kind of cooperation.

4.1 The Treaty on Friendship, Partnership and Cooperation

The Treaty of Friendship, Partnership and Cooperation was signed by Italy and Libya on 30 August 2008. The agreement aims to fight clandestine immigration on the Mediterranean.⁵⁷ According to the *Treaty of Friendship* shall other agreements regarding migration management be implemented, particular those signed in 2007. The *Protocol to Face the Phenomenon of Clandestine Immigration* was signed on the 29 December 2007. The protocol states that the parties undertake to cooperate marine time patrols to perform search, surveillance and rescue operation in Libyan territorial waters and on the high seas. Ships are to be made available by Italy and Italian police officers shall provide training and assistance on the use of the ships.⁵⁸ The crew shall consist of both Italian and Libyan personnel.⁵⁹ The Protocol was never published in the Italian official journal.⁶⁰ The information about this agreement is therefore collected from doctrine.

⁵⁶ Rubio-Marin (2014), p. 3.

⁵⁷ Tullio Scovazzi (2014), p. 224.

⁵⁸ Ibid.

⁵⁹ *Hirsi Jamaa and Others v. Italy* [GC] Appl. No. 27765/09, ECtHR 23 February 2012, para: 19.

⁶⁰ Ibid, see footnote 34.

Italy led nine operations on the high seas during 2009 in compliance with the agreements between Italy and Libya to intercept migrants.⁶¹ One of these operations, on 6 May 2009, was investigated by the European Court of Human Rights in the case of *Hirsi Jamaa and Others v Italy*. The applicants alleged that Italian authorities violated Article 3 ECHR, inter alia the principle of *non-refoulement*, through these operations.⁶²

4.1.1 *Hirsi Jamaa and Others v. Italy*

The case *Hirsi Jamaa and Others v Italy* was published in 2012 and is the first judgement concerning extraterritorial interception on the high seas. The case is of importance since it observes the problems of interpretation of Article 3 ECHR. The verdict emphasizes the mandatory responsibilities contracting states have in relation to refugee law and the use of migration management.⁶³

Three vessels carrying about two hundred individuals were intercepted by the Italian Coastguard and Revenue Police on 6 May 2009. The vessels left Libya with the aim to reach the Italian coast but were transferred onto Italian military ships about 35 nautical miles south of Lampedusa and returned to Libya. The occupants were not given any information about the destination and no identification check of the occupants was made by the Italian authorities. The individuals were handed over to the Libyan authorities on arrival in Libya. This operation occurred in accordance with the bilateral agreement *Treaty on Friendship, Partnership and Cooperation* which aimed to decrease the number of irregular migrants between Italy and Libya.⁶⁴

⁶¹ Ibid, para. 14.

⁶² Ibid, para. 3.

⁶³ Di Pascale (2014), p. 308.

⁶⁴ *Hirsi Jamaa and Others v. Italy*, para: 9-13.

4.1.1.1 The Issue of Jurisdiction

The Court started by examine the exercise of jurisdiction. Every contracting state shall secure the rights and freedom of everyone within their jurisdiction, according to Article 1. The Italian government argued that the migrants were rescued on the high seas in accordance with the obligation imposed by international law. The government contended that this obligation does not affirm state's jurisdiction concerning the rescued individuals.⁶⁵

The Court acknowledged the meaning of jurisdiction according to Article 1 ECHR is presumed to be exercised within the State's territory.⁶⁶ Acts performed outside of the State's territory can only constitute an exercise of jurisdiction in exceptional cases.⁶⁷ The Court also recognized that vessels on the high seas are the subject of flag state jurisdiction, which follows of treaty provisions, customary international law as well as the Court's case law. The prerequisite is that the state exercise effective control over the individuals.⁶⁸ The Court emphasized that the individuals were under exclusive control of the Italian authorities from the boarding of the vessel by Italian armed forces to the point where the migrants were handed over to the Libyan authorities. The acts committed by Italian authorities is an exercise of Italian extraterritorial jurisdiction according to Article 1 ECHR.⁶⁹

4.1.1.2 Alleged Violation of Article 3

The Court had to settle whether the acts of the Italian authorities is a violation of Article 3 ECHR, that is the principle of *non-refoulement*. The Court had to evaluate whether the migrants faced a real risk of being exposed to torture or other inhumane treatment after being returned. There are two aspects of this question that has to be examined: firstly, whether the migrants faced a real risk of being subjected to torture in Libya and secondly, whether the migrants

⁶⁵ Ibid, para: 63-66.

⁶⁶ Ibid, para: 71.

⁶⁷ Ibid, para: 72.

⁶⁸ Ibid, para: 75 and 77; *Banković and Others v Belgium and Others* [GC] Appl. No.52207/99, ECtHR, 12 December 2012, para: 73; *Medvedyev and Others v. France* [GC] Appl. No.3394/0329, ECtHR, March 2010, para: 65.

⁶⁹ *Hirsi Jamaa and Others v. Italy*, para: 81.

were exposed to a real risk of being transferred to their respective countries of origin.⁷⁰

Firstly, the Court emphasized that the state must examine the conceivable outcome of the *refoulement* to Libya as well as his or her personal circumstances in order to estimate the risk of the applicant was subjected to inhumane treatment.⁷¹ Reports by non-governmental organizations and international bodies affirmed that the applicant were exposed to a risk following the interception.⁷² Libya was not a party to the Refugee Convention⁷³ and these reports found a deficiency of a legal framework for refugee protection, as no distinction was made between asylum seekers and irregular migrants. People that entered Libyan territory illegally is considered as clandestine and have been subject to systematically arrests by Libyan authorities. Several clandestine migrants have been exposed to torture and other inhumane treatment in these detentions, according to several reports filed by the observers.⁷⁴

Secondly, the Court examined whether the applicants were exposed to a real risk of indirect *refoulement* to their countries of origin, that is Eritrea and Somalia.⁷⁵ The prohibition of indirect *refoulement* has been established in case-law.⁷⁶ The returning state must acquire necessary guarantees from the intermediary state that an individual won't be returned to a country where he or she face a risk of being exposed to torture or other inhumane treatment. To obtain this guarantee is of greater importance when the intermediary state is a third country and thereby not a party to the Convention.⁷⁷ The Court ascertained that the Italian authorities could not expect Libya to offer

⁷⁰ Ibid, para: 85.

⁷¹ Ibid, para: 117.

⁷² Ibid, para: 126.

⁷³ UNHCR, *State Parties to the 1951 Convention relation to the Status of Refugees*, <www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-%20convention-its-1967-protocol.html>, accessed: 2019-12-17.

⁷⁴ *Hirsi Jamaa and Others v. Italy*, para: 125.

⁷⁵ Ibid, para: 139.

⁷⁶ Ibid, para: 146; *T.I v. the United Kingdom*, Appl. No. 43844/98, ECtHR 2000-III; *M.S.S v. Belgium and Greece* [GC] Appl. No.30696/09, ECtHR, 21 January 2011, para: 342.

⁷⁷ *Hirsi Jamaa and Others v. Italy*, para: 147.

guarantees against indirect *refoulement*. The interception of migrants on the high seas to Libya consequently breached Article 3 ECHR, both through direct and indirect *refoulement*.⁷⁸

4.1.1.3 The Bilateral Agreement

The Court declared its view on the bilateral agreement between Italy and Libya. The interception occurred in accordance with the *Treaty on Friendship* which was supposed to be performed in unity with international law and international commitments with regards to refugee protection, that is the principle on *non-refoulement*.⁷⁹ Libya failed to fulfill its obligation under international law with regard to the situation for refugees and asylum seekers. The Court found that the Italian authorities should be aware of the situation in Libya since it is well-known.⁸⁰ It is further established that Italy cannot elude its responsibility through bilateral agreements and Italy's responsibility proceeds after entering these agreements with Libya.⁸¹

4.2 Memorandum of Understanding

The judgement in *Hirsi Jamaa and Others v. Italy* is a denunciation of the Italian migration management and the agreements that has enacted with Libya. Italy and Libya restated their interest of further cooperation on migration control, disregarding the judgement of the ECHR.⁸²

Italy and Libya signed the MoU on Cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the state of Libya and the Italian republic on the 2 February 2017.⁸³ There is only one unofficial English

⁷⁸ Ibid, para: 158.

⁷⁹ Ibid, para: 127.

⁸⁰ Ibid, para: 131.

⁸¹ Ibid, para: 129.

⁸² Di Pascale (2014), p. 308.

⁸³ UNHCR, *UNHCR Position on Returns to Libya*, Update II, <www.refworld.org/pdfid/5b8d02314.pdf>, September 2018, accessed: 2019-12-30, para: 22.

translation of the MoU available.⁸⁴ The MoU was subsequently adopted by the European Council and integrated in the Malta Declaration on the 3 February 2017.⁸⁵ It is stated in the Malta Declaration that the European Council encourage individual Member States to cooperate directly with Libya. The Council upholds the MoU between Italy and Libya and states that the cooperation is welcomed.⁸⁶

The MoU share a lot of similarities to the *Treaty on Friendship*, since the aim with the MoU is to decrease the number of migrants crossing the Mediterranean. Italy (and the EU through the Malta Declaration) provides assistance to the management of the detention centers where intercepted migrants are taken. The Libyan Coast Guard are given more financial support, equipment and other assistance in order to intercept an increasing number of migrants.⁸⁷

UNHCR observed that the number of people who attempted to cross the Mediterranean from Libya to Italy has increased since 2017. It has also been observed that the number of people who actually manage to cross the sea has declined during the same time period, which is a result of increasing interception operations by the Libyan Cost Guard. There has also been reports of a higher number of deaths on the Central Mediterranean Route since 2017.⁸⁸ The situation for migrants in Libya has remained unchanged during this time period. UNHCR still publish reports concerning the vulnerable

⁸⁴ Ibid.

⁸⁵ European Council, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, accessed 2019-01-28.; Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, accessed 2019-12-28, p. 43.

⁸⁶ European Council, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, accessed 2019-01-28, para: 6(i).

⁸⁷ Memorandum of understanding on co-operation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of border between the State of Libya and the Italian Republic, 2 February 2017, <www.statewatch.org/news/2017/oct/it-memorandum-of-understanding-libya-migration-deal.pdf>, accessed: 2019-11-27, para: 1(c).

⁸⁸ UNHCR, *UNHCR Position on Returns to Libya*, accessed: 2019-12-30, para: 22.

situation for migrants.⁸⁹ Libya is still not a party to the Refugee Convention⁹⁰ and has not established any asylum legislation or procedure.⁹¹

4.2.1 S.S and Others v. Italy

The case *S.S and Others v. Italy* is pending before the ECtHR, but no judgement been delivered.⁹² The case relates to the events that took place during the interception of 150 persons on international waters by the Libyan Coast Guard. The applicants claim that the interception is a breach against Article 3 ECHR since they are exposed to torture and other inhuman treatment by the *refoulement*.⁹³ The application of the case has been communicated to the Italian Government on 26 June 2019.⁹⁴ Due to the similarities to the *Hirsi*-case will only the issue of jurisdiction be examined in this part. The potential breach of Article 3 will subsequently be analyzed in chapter 5.

4.2.1.1 The Issue of Jurisdiction

A joint third-party intervention was submitted by Amnesty International and HRW on 11 November 2019.⁹⁵ One of the major differences in contrast to the *Hirsi*-case is the absence of Italian authorities during the interception. Amnesty International and HRW claim that the acts still are within Italian jurisdiction, despite the lack of presents during the events, due to their effective control over policy. The Italian control over policy consists of the

⁸⁹ Ibid, para: 15 ff.

⁹⁰ UNHCR, *State Parties to the 1951 Convention relation to the Status of Refugees*, accessed: 2019-12-17.

⁹¹ UNHCR, *UNHCR Position on Returns to Libya*, accessed: 2019-12-30, para: 15.

⁹² European Court of Human Rights: *Factsheet – Collective expulsions of aliens*, accessed: 2020-01-05.

⁹³ Human Rights Watch: *Italy Shares Responsibility for Libya Abuses against Migrants – Third-Party Intervention Filed at European Court of Human Rights*, accessed: 2020-01-05.

⁹⁴ European Court of Human Rights: *Factsheet – Collective expulsions of aliens*, accessed: 2020-01-05.

⁹⁵ Human Rights Watch and Amnesty International, joined third party intervention on the case *S.S and Others v. Italy*, 11 November 2019, <www.hrw.org/sites/default/files/supporting_resources/hrw_amnesty_international_submissions_echr.pdf>, accessed: 2020-01-05.

Italian support to enable Libya to conduct interceptions, donating vessels and offer training to the Libyan Coast Guard.⁹⁶

A joined third-party intervention was also submitted by The Aire Centre, The Dutch Refugee Council, The European Council for Refugees and Exiles as well as The International Commission for Jurists on 11 November 2019.⁹⁷ The interveners also claim that the acts are exercised within extraterritorial jurisdiction by Italy. They argue that the agents exercise authority under Italian control has expected effects on Convention rights.⁹⁸

⁹⁶ Ibid, para.2 ff.

⁹⁷ The Aire Centre, DCR, ECRE and ICJ, joined third party intervention on the case S.S and Others v. Italy, 11 November 2019, <www.asylumlawdatabase.eu/sites/default/files/aldfiles/ECtHR-SS_v_Italy_final-JointTPI-ICJECREAIREDCR-English-2019.pdf>, accessed: 2020-01-06.

⁹⁸ Ibid, chapter 1.

5 Analysis and Conclusion

The overall aim of this study has been to explore the use of interception on the high seas and the compatibility with the principle of *non-refoulement*. The fundamental character of the prohibition of *refoulement* has been demonstrated in chapter 2. This observation can be opposed by the current development on the Mediterranean where states increasingly intercept individuals who are seeking international protection, which often is based on bilateral agreements between states. The analysis therefore investigates whether the MoU constitutes a potential breach of the principle of *non-refoulement* by Italy.

5.1 The Fundamental Character of The Principle of *Non-Refoulement*

There is a tension between national sovereignty consisting of the authority to control its borders in contrast to the obligation that is stated in international refugee law and human rights. The question that arises is how far a state is allowed to go in order to control its borders without breaching fundamental human rights, such as the principle of *non-refoulement*?

Due to the research of this study is the answer quite clear. The principle of *non-refoulement* is significant in international refugee law and an important part of human rights law. The principle of *non-refoulement* forms the outer limit to the obligation for states to offer international protection and constitutes an exception from national sovereignty. ECtHR states the principles fundamental character in the cases *Hirsi-case* and *Saadi-case*, see chapter 2.2. Some of the essential aspects of the principle are considered to be embedded in customary law and some even consider it to be a *jus cogens* norm, see chapter 2.3.

But the development of the increasing number of extraterritorial pre-border controls presents a different view. ECtHR stated in the *Hirsi*-case that interception that was occurred in compliance with the *Treaty of Friendship* did constitute a breach of Article 3 and thereby the principle of *non-refoulement*. Regardless of this judgement has Italy and Libya maintained their cooperation, which has been endorsed by the European Council and incorporated in the Malta Declaration, see chapter 4.2.

The theoretical and practical aspect of the obligations due to the principle of *non-refoulement* diverge. It seems like states can take advantage of the special nature of the maritime environment as a place of non-sovereignty and beyond the jurisdiction of states. However, the high seas are not a law-less space where refugee law and human rights are absent as professor Goodwin-Gill has stated, see chapter 2.3. UNHCR has presented several practical and legal frameworks as well as recommendations to clarify the obligations during maritime interception. A selection of these documents can be found in chapter 2 and 3. The position of the UNHCR clearly states that the principle of *non-refoulement* is essential during maritime interception and must be respected, even if states has a legitimate ambition to control their borders.

5.2 Breach of the Principle of *Non-Refoulement*?

The extent of the obligations due to the principle of *non-refoulement* is still vague, but it is clear that the migration policies that occur in compliance with the MoU is a breach of Article 3 ECHR. It is established through the examination of legal sources such as the Refugee Convention, ECHR, case-law and recommendations from international bodies that the principle of *non-refoulement* is fundamental to the right to international protection. It was established in the *Hirsi*-case that the situation in Libya constitutes a real risk of the exploitation to torture or other inhumane treatment. The situation for migrants in Libya remains unchanged, due to recent reports from international

bodies, see chapter 4.2. This implies that the ECtHR will adjudicate the alleged violation of Article 3 in a comparable way.

However, the issue of jurisdiction must be established in order to determine state responsibility. The Contracting states of ECHR are obligated to protect everyone within their jurisdiction, and the *Hirsi*-case establish extraterritorial jurisdiction during interception on the high seas. Thus, is it necessary that the state exercise effective control over the individuals or territory when establishing extraterritorial state jurisdiction, see chapter 3.2. The absence of Italian authorities during the interception imply that there is no contact between the Italian state and the migrants.

There will arise an opportunity for states to elude its responsibility through bilateral agreements if the ECtHR determine that these actions is beyond Italian extraterritorial jurisdiction. *The Treaty of Friendship* was condemned by the ECtHR and the Court stated that the prospect destination country still has an obligation to follow international law, see chapter 4.1.1.3. It is therefore essential that these actions are seen as an exercise of Italian jurisdiction.

5.3 Conclusion

It has been affirmed in earlier case-law from the ECtHR the *refoulement* of migrants to Libya constitutes a breach of the principle of *non-refoulement*. Recent reports from international bodies show that the situation for migrants in Libya remains unchanged. The situation in Libya entails a real risk of being exposed to torture or other inhumane treatment after being returned. The research demonstrates that the cooperation between Italy and Libya that occur in compliance with the MoU constitutes a potential breach of the principle of *non-refoulement*.

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